IN THE COURT OF APPEAL OF BELIZE A.D. 2023

Criminal Appeal No. 10 of 2020

APOLONIO KIOW
aka APOLONIO CERVERA — **APPELLANT**

AND

THE KING — **RESPONDENT**

BEFORE

The Hon Madam Justice Hafiz-Bertram	-	President
The Hon Madam Justice Minott-Phillips	-	Justice of Appeal
The Hon Madam Justice Arana	-	Justice of Appeal

Mr. Leeroy Banner for the appellant.
Ms. Cheryl-Lynn Vidal SC, Director of Public Prosecutions, for the respondent

Date of hearing: 15 March 2023
Date of Promulgation: 8 May 2023

REASONS FOR JUDGMENT

HAFIZ BERTRAM, P

Introduction

[1] The Appellant, Apolonio Kiow, ('the Appellant') was indicted for the murder of Gabriel Bochina ('the deceased'). It was alleged that he shot the deceased on 4 October 2017 at Corozal Town. The deceased died later on the morning of 5 October. The Appellant's defence was alibi. On 9 July 2020, he was convicted, after a trial, of the offence of murder before Lord J, sitting alone. On the 29 April 2021, he was sentenced to life imprisonment, with eligibility for parole after the expiration of 25 years, less the period of 3 years and 7 months that he had spent on remand.

[2] The Appellant appealed his conviction on the ground that he did not receive a fair trial as guaranteed by the Constitution of Belize, for six reasons, namely: (i) the trial judge's inadequate assessment of the identification evidence; (ii) his treatment to the res gestae evidence; (iii) failure of the Crown to negative the defence of alibi; (iv) the trial judge did not

warn himself of false alibi; (v) the summing up was not balanced and (vi) the absence of a good character direction. On 15 March 2023, this Court heard the appeal and was satisfied that the Appellant received a fair trial and that there was no miscarriage of justice. The reasons for advancing unfairness were unmeritorious and therefore, the Court dismissed the Appeal after hearing oral arguments. The Court promised to give reasons and we do so now.

The case for the Prosecution on the identification evidence

[3] The Prosecution called 17 witnesses to prove its case. The witness, Jeshanah Zetina ('Jeshanah'), the common law wife of the deceased, was crucial in the identification of the Appellant as she was present when the deceased was shot by him. She identified the Appellant whom she recognised and knew as 'Polo,' to be the shooter. There was also evidence from Jeshanah that the deceased, shouted "Shana, Polo!" immediately after he was shot. On his way to the hospital the deceased told Jeshanah to "*call Mama and tell her Polo just shot me.*" According to her evidence, the deceased repeated three times that Polo shot him.

[4] Jeshanah's evidence established how the deceased was gunned down in her presence and the presence of their three children. She testified that on 4 October 2017, herself and the deceased, her common law husband, and her three children went to Chetumal Mexico to take her mother-in-law and her father-in-law to the ADO bus as they were travelling to Canada. They stayed with them at the ADO Terminal, Chetumal, until the bus left at 9:00 pm. On their way back, they went to Walmart to do some shopping and left at 10.00 pm. After that, they headed back to Corozal where they reside and arrived home at 10.30 pm. She further testified:

> *"When we arrived home at 10.30 pm we drive in our Chevy pick-up and we parked inside the yard right in front of the plywood shack we have there. From there Gabriel came out of the pickup to open the door of our house, but he came out about three (3) feet from the pickup door that is when I heard two (2) loud noise bang-bang. Immediately Gabriel shouted "Shana – Polo". I was already coming out of the pickup that is when I told my kids to put on their shoes. But as I heard the 'bang-bang' and Gabriel shouted "Shana-Polo", that's when I ran at the back of the pickup where I ran up into Polo.*

From there he was standing right there facing Gabriel and then I shouted at him and I said "Polo" and he turned and looked at me and the purse I had in my hand I stoned him with it which hit him and fell on the ground. Then he pointed a 9mm black firearm at me and I saw he cranked the gun, the top, and he pulled the trigger, but it got jammed and I turn around and ran to the passenger side of the pickup and shouted to my kids – "call the police, call the police." ... But my phone was in my back pocket and I turned around to get my phone that is when I saw Polo run through the picado bushes going to the Ricalde Stadium...."

[5] Jeshanah further testified that the distance between herself and Polo was five feet and nothing obstructed her view. There was light from the nearby lamp post (30 – 50 feet away), her veranda light was on and her neighbour, the Custom Officer, had on bright lights. She described Polo's physical appearance and that he had a cloth covering his mouth, the cloth was below the nose and tied to the back. She was able to observe Polo in bright lights when he turned and faced her for 20 seconds directly in her face. He pointed a gun at her, for seconds only, and pulled the trigger but it jammed. Also, she observed him for 20 seconds while the Appellant was looking at the deceased. Then for another two seconds when the Appellant ran towards the Ricalde Stadium.

[6] Jeshanah had called Idalicia Zetina a.k.a. Mama ('Mama') to tell her that her husband was shot. Shortly after arriving at the hospital, Mama arrived also and Jeshanah relayed the message from the deceased that Polo had shot him.

[7] Jeshanah also gave an account of the incident while at the hospital to Sgt. Teck, one of the witnesses for the Prosecution. His evidence, relevant to the appeal, was that Jeshanah told him:

"... on her husband exiting the vehicle someone fired shot at him. She turned around and saw a male person who had his face covered with a piece of cloth and immediately identified the person as Polo. The said male person pointed the gun towards her, however the gun jammed, the male person then turned around and ran in the direction of the Ricalde Stadium."

Unsworn Statement of the Appellant

[8] The Appellant's defence as shown by his unsworn statement was alibi. He gave an account of what he did on 4 October 2017, during the day and the night.

> "……
>
> So when I reach home Ms. Vernon and my woman was at home. So I told them I am tired and I want to bathe, eat something and go to my bed.
> So Ms. Vernon is my neighbor, she told me 'Polo I going home, I leave you'. I escort she to my gate, it have a chain so I put the chain and a padlock.
> So I went to bathe when I get through, my woman gave me some food, so when I finish eat we went to bed with my kid that had 1 year 1 month and 4 days at that moment. So I fall asleep, but when I went to bed it was raining. In my room I have in front a glass window, but I am sleeping with my woman and my kid. So a strange thunder wake me up, sake of the glass window the lightening shine very strong inside. So at that moment of the lightening and that thunder the current gone. So in my bed again with my 1 year boy. So I drop asleep and so my woman wake me and she told the police is out there. When she told me the police is out there I heard someone rap on the door. So I went and I put the light, when I hear it say police to open. So I open my door, when I see that it is police.
>
> I was in a blue boxer when the police told me my rights and he told me that I am detained. So I ask him for what? So he told me about Mr. Gabriel Bochina that someone shot him and my name is on it according to the police. So I told him how could I be going out there I am just waking up from my bed, I could get sick. So he told me to put some clothes. So my woman bring for me a pants and a shirt. So on the side of the house I have an umbrella and I take the umbrella and I went with them in the pickup. At the same moment going out I see my gate was broken. So I ask the police to please cover the door because I have a lot of local chickens (fowls) etc., and they do that for me.
>
> So at that same moment I feel very bad like a victim than a crime that I have any knowledge about it. In the moment that my woman needs me on the side because we have a baby that have 1 year and my woman had 2 months and days pregnant for a girl

we have now and she was not helped because when she is pregnant some time she like fall. I want to say that me and Mr. Gabriel we never had any problem. Mr. Gabriel give me a respect maybe sake of age, I don't know, but every morning when I go to work he said, 'Mr. Kiow I want you to do certain work today'. Anytime I go to work that is what he says, Mr. Kiow you are going to do certain work for me today."

Witness for the Appellant – Erica Cante

[9] Erica Cante, (Ms. Cante) the common-law wife of the Appellant, testified that in 2017, she was living in Corozal, Santa Rita Road. On 4 October 2017, about 5:00 pm to midnight she was sick and her husband left Ms. Therese to take care of her until he returned home. She testified:

"He came back at 7:00 p.m. nothing happened. In my home that day the police came and look for him they made a mess inside. I don't know nothing. At home at 7:00 p.m. was myself, my baby and my husband. ….
He came in and he had a bath, he had supper, he told me he was tired and he went to sleep. That day I couldn't go to sleep because it was raining hard. I stayed sitting at the edge of my bed. The bed is big, I am at the edge and he is in the middle with my baby. The house has three doors. The room where I was in has one door. I was able to see my husband from when he fell asleep until the police come."

The decision of the trial judge

[10] The trial judge after carefully analysing the evidence for the Crown and the Defence, as shown in his judgment, was satisfied that the Prosecution had proven all the elements of the charge of murder. He did not accept the defence of *alibi* and found that it failed. The trial judge was satisfied to the extent that he felt sure that it was the Appellant who inflicted the harm that resulted in the death of the deceased with the intention to kill him. Accordingly, he found the Appellant guilty of the charge of murder. He sentenced him to life imprisonment with eligibility for parole after 25 years, less 3 (three) years 7 (seven) months, the period for which he was remanded before trial, effective from 5 October 2017.

The grounds of Appeal

[11] The Appellant, filed six grounds of appeal under the broad heading that he did not receive a fair trial. These grounds are:

(i) The trial judge's assessment of the identification evidence was inadequate as he failed to consider all the weaknesses in the identification evidence.

(ii) The trial judge erred in law by not properly addressing his mind on how to treat the hearsay evidence [res gestae] of what the deceased allegedly said to Jeshanah, and what she allegedly said to Idalicia Zetina and Sgt. Everon Teck.

(iii) The Crown did not negative the Appellant's defence of alibi.

(iv) The trial judge did not warn himself on false alibi/ Lucas direction and wrongly placed the burden of proving his alibi on the Appellant.

(v) The summing-up was not balanced, as the trial judge did not sufficiently address his mind to the Appellant's case and his assessment of the evidence was more favorable to the Crown.

(vi) The absence of a good character direction affected the fairness of the trial.

Ground 1: Whether the assessment by the trial judge of the identification evidence was inadequate

[12] Mr. Banner contended under this ground that the trial judge's assessment of the identification evidence was inadequate as he failed to consider all the weaknesses in the identification evidence. Further, it was incumbent on the trial judge to address his mind in accordance with the guidelines set out by Lord Widgery in ***R v Turnbull [1977] QB 221***.

The Turnbull guidelines

[13] In ***Turnbull***, Lord Widgery CJ said at p. 229:

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the

> defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.
>
> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence."

[14] The Court carefully reviewed the evidence in this case and the judgment of the trial judge and was satisfied that he had properly addressed all the relevant guidelines as set out in ***Turnbull***. The entire case turned on the identification of the Appellant as the person who shot and killed the deceased. His defence was that of alibi as shown by his unsworn statement and the evidence of his witness, Cante, his common-law wife. The defence of alibi was rejected but this was not an indication as to guilt as mentioned by the trial judge.

[15] The identification of the Appellant was by recognition as Jeshanah knew him since she was growing up and he worked for seven months with the deceased. The trial judge gave

himself the warning that even though Jeshanah claimed to have recognised the Appellant he had to be careful as a mistaken witness could be a convincing witness.

Totality of seconds Jeshanah observed the Appellant

[16] Learned counsel, Mr. Banner submitted that the trial judge did not sufficiently address his mind to the weaknesses **in** the identification evidence and misquoted the evidence in reaching the conclusion that the Jeshanah had seen the Appellant's face for 40 seconds and that nothing obstructed her view. Further, that one weakness in Jeshanah's evidence was that she observed the shooter's face for about 20 seconds while staring down the barrel of a gun. However, the trial judge misquoted the evidence to say that the witness had the shooter's face under observation for 40 seconds.

[17] Counsel further argued that throughout the written judgment, the trial judge referred to the length of time that the witness had the shooter's face under observation as being between 40-42 seconds, and that in his (the judge's) opinion, the witness had ample time to see and recognize the Appellant. On the other hand, at no time in his judgment did the learned trial judge refer to the fact that the witness was staring down the barrel of a gun. He contended that the observation was made under extremely difficult circumstances and by Jeshanah's own admission during cross-examination, she did not see the person's whole body, as the cloth covered part of his face from his mouth down.

[18] The Court carefully scrutinised the judgment of the trial judge and was satisfied that the trial judge had not misquoted the evidence in relation to the length of time Jeshanah observed the Appellant. The evidence of Jeshanah showed that she saw the Appellant three times. Firstly, for 20 seconds while the Appellant was looking at her husband, the deceased. Secondly, when she called out the Appellant's name, as she knew him "Polo" and he turned to face her. The third time was when he ran towards the Ricalde Stadium. The combination of time that the Appellant was under observation by her was therefore 42 seconds. The identification evidence from Jeshanah quoted below states:

> " …….. But as I heard the 'bang-bang' and Gabriel shouted "Shana-Polo", that's when I ran at the back of the pickup where I ran up into Polo.

From there he was standing right there facing Gabriel and then I shouted at him and I said "Polo" and he turned and looked at me and the purse I had in my hand I stoned him with it which hit him and fell on the ground. Then he pointed a 9mm black firearm at me and I saw he cranked the gun, the top, and he pulled the trigger, but it got jammed and I turn around and ran to the passenger side of the pickup and shouted to my kids – "call the police, call the police. (page 63 of the Record)

……

My husband was going towards the cement house. The door of the house was 6 – 8 feet from my husband. The distance between me and Gabriel was across the pickup so it was 6 – 7 feet. The bangs (gunshots) were very loud. It was like about 40 second after my husband came out of the vehicle. I hear the shots and immediately I heard Gabriel shout "Shana – Polo". It was very hard, so to get my attention and Gabriel was 6 - 7 feet distance from me. … I ran west then south and behind the pickup and I stopped when I saw Polo standing there. I stopped behind the pickup by the left hand side of the light. I was about 5 feet from Gabriel when I came to a stop. I came to a stop because I saw Polo standing right there and I saw he was just standing there. (Page 67 of the record)

.....

After I heard the bang-bang, I came to a stop maybe three (3) seconds as I ran up into him. The distance between Polo and my husband was about three (3) feet away and Gabriel was on the ground. The distance between Polo and me was five (5) feet away and nothing obstructed my view. **I saw Polo looking at the direction of my husband for <u>about 20 seconds</u>.** I saw his whole body. The veranda light was on, the lamppost light, the neighbor, the Customs Officer has some bright lights and it was on also. The lamppost was 30 to 50 feet away. The veranda light was 10 – 15 feet from me and it was about 7 – 8 feet from Gabriel and from Polo about 10 feet away. Just the chain link fence was between Gabriel and Polo. The person I saw a chubby short guy with acne on his face, dark brown skin, has grey and black short hair. He had a cloth covering his mouth. Long pants and shirt with sleeves. It was a cloth below the nose and tied to the back (Demonstrated by the witness to the court). I called out Polo, and when I shouted

Polo to get his attention that is when he looked at me. He was facing directly in my face. (Witness demonstrates distance to the court and as agreed by the counsel and court, the distance is estimated at 3 – 4 feet away). (page 68 of the Record)

When I shout his name, he turned and face me. The lighting conditions, it was bright when he turned and faced me for about 20 seconds directly in my face. – (page 68 of the record) ……..

I saw when he cranked the gun a 9mm black gun in his left hand and with his right hand, he cranked it. He pointed the gun at me, when he turned to me, he pulled the trigger but it jammed (Witness demonstrate to the court the actions etc.) The gun was pointed at me for seconds only. The gun jammed …. I saw Polo running to the Ricalde Stadium about 2 seconds – the lighting conditions was clear. About two (2) minutes after I heard the bang-bang I saw Polo running towards the Ricalde Stadium. (sic)" – page 69 of the record).

[19] The trial judge having heard Jeshanah testified, recounted the three times she had the Appellant under observation as shown below:

> **"How long did the witness (Jeshanah Zetina) have the person she says was the accused under observation?**
>
> Here I note she stated in her evidence that after her husband (Gabriel Bochina) got out of the pickup and was 6 to 7 feet distance from her and about 40 seconds after he came out she heard 'bang – bang' and he shout 'Shana – Polo' – she stated she ran West then South and behind the pickup and she stopped there and she stated – and I stopped when I saw 'Polo' standing there as I ran up into him. The distance between Polo and me was 5 feet away and nothing obstructed my view and **I saw Polo looking at the direction of my husband for about 20 seconds**. I called out Polo and when I shout Polo to get his attention that is when he look at me. **He turned his face and faced me for about 20 seconds directly in my face. I also saw Polo running to the Ricalde Stadium for about 2 seconds later**. The court (myself) therefore notes that – **the witness from the evidence had the gunman/shooter she calls Polo in her**

> **vision/sight a total of 40 seconds and added 2 seconds when she saw him running towards Ricalde Stadium, total being 42 seconds."** (emphasis added)

[20] This Court upon reviewing the evidence was satisfied that the trial judge had not misquoted the evidence. The trial judge did the mathematics and correctly added 20 plus 20 plus 2 (20+20 +2 =42), which was a total of 42 seconds. Further, Jeshanah did not say that she observed the shooter's face for about 20 seconds while staring down the barrel of a gun. As shown at page 69 of the record, Jeshanah testified that "*The gun was pointed at me for seconds only."*

Was the Identification of the Appellant made under extremely difficult circumstances?

[21] The Appellant complained that the identification of the Appellant was made under extremely difficult circumstances. The Court disagreed with that argument although a gun was pointed at Jeshanah for seconds. This was a case of recognition and was made under good conditions. The trial judge warned himself that he should examine the circumstances in which the identification was made of the Appellant very carefully and he followed the guidelines in ***Turnbull***. He asked himself the questions as he recalled the evidence of Jeshanah as to her identification of the Appellant on 4 October 2017, the night of the shooting. The questions being: (a) the length of time the Appellant was under observation by Jeshanah (already discussed above to be a total of 42 seconds); (b) In what light did Jeshanah see the shooter? (c) At what distance; (d) Did anything interfere with the observation of the person? (e) Did Jeshanah ever see the Appellant before? (f) If so how often?

[22] The trial judge recounted Jeshanah's evidence on identification by recognition and how often she saw the Appellant (page 70 of the record). In his judgment he said:

> **"Had the witness ever seen the person she knew before?"**
>
> Jeshanah Zetina stated in her evidence as follows – I knew him from I was small. He was friends with my dad, and he worked for 7 months with us and when Gabriel went to Canada, I gave him the pay cheque and I spoke to him (e.g.) 10 – 30 minutes. Someone I knew, when

Gabriel was in Canada, he came every day for the tools and on a weekend he spoke to me about the work and I would give him the pay cheque. I know Polo as Apolonio Cervera."

[23] In relation to the lighting conditions the judge stated that Jeshanah testified that *"the lighting condition was bright/good. The veranda light was on, the lamp-post light, the neighbour (the custom officer) has some bright lights and it was on also. It was also the lamp-post was 30 to 50 feet away. The veranda light was 10 to 15 feet from me and it was about 7 to 8 feet from Gabriel and from Polo about 10 feet away."* The trial judge also recounted the evidence of the witnesses Sgt #1309 Zamir Noh, PC #1285 Anthony Williams, W/Cpl #1377 Belky Gilharry, all of whom he stated corroborated the evidence of Jeshanah that the lighting conditions in the area was "bright/clear." He said that "*it is noted that it was in that light she stated she saw and recognized the shooter on 4th October, 2017 at her residence in Corozal Town."*

[24] As for distance and whether there was anything obstructing Jeshanah's view, the trial judge stated that her evidence was that the distance between the Appellant and herself was 5 feet and nothing obstructed her view. The judge noted that Jeshanah demonstrated the distance in court which was agreed to be 3 – 4 feet away, more or less.

[25] The Court having reviewed the identification evidence of the Appellant by Jeshana, a witness found to be credible by the trial judge, was of the view that it was not made under extremely difficult circumstances.

[26] Mr. Banner argued that another weakness in Jeshanah's evidence was that the trial judge did not consider what she told Sgt. Teck at the hospital, which differs significantly from what she testified to in court in relation to the cloth on his face. According to Sgt. Teck, Jeshanah told him that the Appellant had his face covered with a piece of cloth and she identified him as Polo. But, in court, the witness said that the cloth was covering his mouth, and later said it was below the nose and tied to the back. She also stated in cross-examination that she did not tell Sgt. Teck that the person had his entire face covered.

[27] Counsel contended that after carefully analysing what Jeshanah told Sgt. Teck versus what she actually testified to in court, the difference between both could be considered as a

material inconsistency as she did not tell Sgt. Teck that (a) the cloth was covering the person's mouth but rather the cloth covered his face; (b) that she called the shooter by his name and when she did that, he looked at her; (c) that she ran into the shooter and (d) she did not put in her statement to the police that Polo is Apolonio Cervera or Apolonio Kiow. For those reasons Mr. Banner submitted that the trial judge did not address his mind to the inconsistencies and discrepancies between what Jeshanah had in her witness statement compared to what she testified to and what was told to Sgt. Teck at the hospital.

[28] It was the view of the Court that the trial judge, who was the trier of fact, had to resolve any material inconsistencies and discrepancies in the evidence. He had in fact addressed the evidence as to whether the Appellant's entire face was covered or not. He referred to Jeshanah's evidence-in-chief and her evidence in cross-examination. The judge stated that in cross-examination, Defence Counsel asked Jeshanah the following questions:

> "Q. You said the person you saw as the shooter had a cloth below the nose, and you saw his face, **why say to Sgt. Teck the person you saw had his entire face covered?**
>
> A. **I never said that.**
> Q. I am suggesting you said to Sgt. Teck, the shooter I saw a male person who had his face covered and I identified him as Polo?
> A. **I said, he had a cloth over his face, but not all of it.**
> Q. You did not say all of it, you did not qualify it?
> A. **I did not give him the detail, but his entire face was not covered.**
>
> Again, I also looked at the evidence-in-chief of the witness Jeshanah Zetina and I noted she stated in her evidence as follows:
>
> *'The person I saw, a chubby, short guy with acne on his face; dark brown skin and his grey and black short hair.* ***He had a cloth covering his mouth, long pants and T-shirt with sleeves***. ***It was a cloth below the nose and tied to the back***'*."*
> (emphasis added)

[29] The trial judge resolved this issue by finding that Jeshanah was a credible witness. He said "…. *I also after careful consideration* ***believe/accept that the cloth only covered his***

mouth *as she described it in her evidence-in-chief and in her answers in cross-examination."* The trial judge obviously believed that a person can be recognised even with his face covered from the mouth downwards. This was not a weakness in the identification of the Appellant by Jeshanah which required a direction to himself. Jeshanah recognised the Appellant immediately upon seeing him.

[30] The case of ***Jermaine Pascascio v R, Criminal Appeal No 12 of 2006***, relied upon by Mr. Banner can be distinguished from the instant appeal. There were discrepancies in the identification evidence and the trial judge in his summation did not remind the jury of specific weaknesses in the evidence of a witness, (Cantun) at the time he was directing them on the issue of identification. The weaknesses in Cantun's evidence was the different descriptions of the Appellant's skin colour. Further, it was not sufficient for the judge to give the direction at some other stage as that would not have satisfied the **Turnbull** guidelines and therefore, a new trial was ordered.

[31] In the view of the Court, the trial judge properly considered Jeshana's evidence in chief and cross-examination and thereafter concluded that the veracity of Jeshanah was "*indeed tested and from the evidence before the court and in the cross-examination of her, she indeed stood strong and maintained throughout that she was sure it was Polo and that she did recognize him when she ran into him and observed him."* He heard her testify and it was within his purview to make that assessment of her evidence.

[32] Further, the trial judge stated that several of the witnesses apart from Jeshanah stated in their evidence that they also knew the accused as Polo and/or Polo Cervera for many years and they also identified the accused Apolonio Kiow as Polo Cervera and Apolonio Cervera, names they were familiar with and knew was associated to the accused. Thereafter the trial judge concluded:

> "Therefore after consideration of all the evidence, I am led to accept and conclude that Polo Cervera, Apolonio Cervera is one and the same person, now formally proven to be registered in the birth certificate as Apolonio Kiow. I therefore accept the submissions of the Crown in contrast to that of the Defence."

[33] The Court was of the view that the trial judge adequately addressed the evidence which identified the Appellant as the person who shot and killed the deceased and this can be seen by the reasons for his findings.

The judge's findings in relation to identification

[34] The trial judge considered the entirety of the evidence and found:

> "I have therefore now again very carefully considered the entire evidence before the court with particular reference to the identification of the shooter as described by the Prosecution's witness Jeshanah Zetina, and after a very careful study of her evidence-in-chief and her cross-examination I am of the opinion that she was unshaken in her evidence and answers before the court. I there again looking carefully at her evidence as enunciated above, she stated that the lighting conditions was bright and good, this was corroborated by the police witnesses who went to her home shortly after the incident.
>
> Having looked at the evidence, I accept and I believe that she had ample time to see and recognize the person whom she described as knowing from her childhood and who had worked for her and her husband, and had interacted with her during the employment for 7 months particularly when her husband Gabriel was in Canada. The person whom she described as speaking to every day and had given him the tools each day and whom she made out pay cheque for on weekend. I am satisfied from her description of the shooter that the description as the Crown submitted does fit the accused perfectly.
>
> I also after careful consideration believe/accept that the cloth only covered his mouth as she described it in her evidence-in-chief and in her answers in cross-examination and therefore as in the case of Nelson Gibson v R it was far enough for the shooter to be recognized in the lights and the time he was under observation by the witness Jeshanah Zetina (eg) the light was bright and he was under observation for 40 to 42 seconds from the evidence before the court.
>
> …….

I note also as the jury that from the evidence that the witness knew the accused as Polo and as from the evidence that he is also called Polo. However, she stated and it was not disproved that she paid him his pay cheque on weekend and she knew and identified the accused in court as Apolonio Cervera. I also note that several witnesses including the arresting officer in this trial knew the accused as Polo – Polo Cervera."

[35] The Court had no reason to interfere with the findings of the trial judge and was of the view that the Appellant received a fair trial and there was no miscarriage of justice. We were in agreement with the learned Director that the trial judge adequately addressed the issue of identification in his judgment. He thoroughly recounted the evidence led by the Crown in relation to the identification of the Appellant and applied the ***Turnbull*** guidelines in making his findings. The ground therefore failed.

Ground 2: "Whether the trial judge erred in law by not properly addressing his mind on how to treat the hearsay evidence [res gestae] of what the deceased allegedly said to Jeshanah, and what she allegedly said to Idalicia Zetina and Sgt. Everon Teck."

[36] Mr Banner submitted that a key aspect of the case for the Crown that linked the Appellant to the crime was the alleged utterance of the deceased to Jeshanah immediately after he was shot, and what Jeshanah later told Idalicia Zetina and Sgt. Teck. Further, the trial judge accepted that the utterance of the deceased and the statements of Jeshanah forms part of the *res gestae* in the case. Having so accepted, the trial judge held that *"having considered the Res Gestae and the identification issues together, ..."* the Crown had proven beyond a reasonable doubt that it was the Appellant who caused the harm which resulted in the death of the deceased. Counsel argued that the trial judge should have addressed his mind to the fact that the statements from the deceased was **not subject to cross-examination** and be reminded of the circumstances under which the statement was made and the opportunity that existed to facilitate an accurate identification, or which might have resulted in a mistake. Counsel relied on the case of ***Stoutt v R [2014] UKPC 14***, where the Privy Council held that hearsay evidence is admissible, but it always suffers from the disadvantage that the jury cannot see the source of it and cannot see the accuracy tested.

[37] Mr. Banner further submitted that the trial judge should have directed himself of the **need for caution** especially in relation to the ***Turnbull*** guidelines and the possibility that the deceased was mistaken when he said that Polo shot him.

The res gestae exception

[38] If a statement is an out of court statement, and in that sense, hearsay evidence as well as an excited utterance, it can under certain conditions be admitted under the "res gestae" doctrine. However, an excited utterance is not necessarily hearsay evidence: See Salazar ***[2019] CCJ 15 (AJ) (BZ)*** at [33]; ***Faux (Belize CA, Crim App No 3 of 2007***). (Section 4 of the **Evidence Act**, Cap 95, Revised Edition 2020 of the Laws of Belize provides for the operation of the common law rules and principles).

[39] In the instant matter, the deceased spoke to Jeshanah who gave evidence as to what he said immediately after being shot and when he was on his way to the hospital. Such utterances/statements are admissible under the *res gestae* exception. The basis for admissibility under the *res gestate* exception is that hearsay can be regarded as more likely to be reliable if the statement was made spontaneously. ***Halsbury's Laws of England, Criminal Procedure (Volume 28 (2021) at para 631***, addresses the admissibility of *res gestae* statements:

> "**Res gestae**
>
> The following exceptions to the rule against hearsay, which were established at common law and are each considered to concern evidence forming part of the **'res gestae' (that is they are 'facts or statements so closely surrounding or accompanying the event or transaction in question as to form an intrinsic part of the overall picture'**), have now been preserved by statute in so far as they apply to criminal proceedings, namely that a statement may be admissible as evidence of any matter stated if:
>
> (a) the statement was made by a person (who may or may not be available to testify as a witness) so **emotionally overpowered** by an event that the possibility of concoction or distortion can be disregarded,

(b) the statement accompanied an act which can be properly evaluated as evidence only if considered in conjunction with the statement, or

(c) the statement relates to a physical sensation or a mental state (such as intention or emotion)."

Although preserved, **the practical importance of the res gestae principle (often used at common law to admit the dying statements of murder victims or of other persons since deceased)** appears to be greatly diminished given the extensive provision for the admission of hearsay evidence by statute."

R v Andrews [1987] AC 281

[40] The *res gest*ae principle is further explained in ***R v Andrews [1987] AC 281***. In that case, the trial judge admitted an oral statement by a victim who was stabbed and later died. The victim's statement to a police officer as to who stabbed him was found to be admissible. It was held in that case that a trial judge faced with an application to admit hearsay evidence under the res gestae doctrine, must consider whether the possibility of concoction or distortion can be disregarded, taking into account the circumstance in which the statement was made. For the statement to be sufficiently "spontaneous", it must be so closely associated with the event that the declarant's mind was still dominated by that event. Some special features, such as the possibility of malice in the declarant, may affect the possibility of concoction or distortion and therefore the admissibility of the statement.

[41] Lord Ackner in ***Andrews*** summarised the guidelines for trial judges in a criminal case who have to consider an application under the res gestae doctrine to admit evidence of statements, with a view to establishing the truth of some fact, such evidence being categorised as "hearsay evidence." At page 300-301 Lord Ackner said:

"1. The **primary question which the judge must ask himself is - can the possibility of concoction or distortion be disregarded?**

2. To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so

that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.

3. In order for the statement to be sufficiently "**spontaneous**" it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event. Thus the judge must be satisfied that the event, which provided the trigger mechanism for the statement, was still operative. The fact that the statement was made in answer to a question is but one factor to consider under this heading.

4. Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion. …. The judge must be satisfied that the circumstances were such that having regard to the special feature of malice, there was no possibility of any concoction or distortion to the advantage of the maker or the disadvantage of the accused.

5. As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied upon, this goes to the weight to be attached to and not to the admissibility of the statement and is therefore a matter for the jury. However, here again there may be special features that may give rise to the possibility of error. …. In such circumstances the trial judge must consider whether he can exclude the possibility of error."

The trial judge's approach to the evidence - res gestae statements

[42] In the present case, the trial judge sitting alone had properly directed himself in his approach to the evidence utilizing the above guidelines given by Lord Ackner. He asked himself the primary question, "*can the possibility of concoction or distortion be disregarded?* He firstly considered the statements made by the deceased to Jeshanah and concluded:

"I have considered the evidence of Ms. Jeshanah Zetina and I conclude from the evidence before the court that Gabriel Bochina's utterances was an instinctive reaction to being shot; and I note that this was almost instantaneously; and I note that he had no opportunity to concoct or make false allegations against the accused.

I note from the evidence (he) the deceased had sufficient light to observe the person he claimed shot him. The evidence reveals that Gabriel Bochina immediately shouted "Shana – Polo" right after she (Jeshanah) heard the two "bang, bang". Further it is noted that he (Gabriel) kept repeating inside the pickup truck that "Polo shot me" while on the way to the Corozal hospital.

…. I am satisfied that the statement/utterance made by Gabriel was spontaneous from the evidence before the court."

[43] The trial judge also considered the statements made by Jeshanah to Idalicia Zetina and Sgt. Teck. He analysed their evidence and concluded that (i) Jeshanah's statements were an instinctive reaction to the incident she witnessed at her home where her husband was shot. Further, the statements were sufficiently spontaneous and closely associated with the events.

[44] He accepted the utterances of the deceased and the statements of Jeshanah formed part of the res gestae. In other words, he found the statements to be admissible and would rely on them. He also stated that after careful consideration, "I give due weight" (significance) to the utterances of the deceased and statements from Jeshanah. The trial judge made no mention in the judgment before giving due weight to the statements that Gabriel Bochina is dead and the utterances from him could not be tested by cross-examination. However, he had considered the possibility of error which goes to the weight to be attached to the statement and concluded after assessing the evidence that, "I am convinced there is no possibility of error." He also found that no malice arose from the evidence.

[45] The Court was of the view that even if the trial judge had so directed himself as complained by the Appellant, we cannot say that less weight /significance would have been given to the deceased utterances especially so in the circumstances of the case where Jeshannah's evidence was sufficient to identify the Appellant as the shooter and she was available for cross-examination. We agreed with the Director that it is clear that the trial judge

came to the conclusion that it was the Appellant who shot the deceased based mainly on the evidence of Jeshanah and the res gestae evidence was, at best, supporting evidence.

[46] The ***Stoutt's*** authority relied upon by learned counsel, Mr. Banner, is a case in which the trial judge had to direct a jury and it was also stated that how far the disadvantage may affect the reliability of the evidence varies considerably from case to case. In the present case, we were satisfied that the trial judge who was sitting alone adequately addressed his mind on how he ought to treat the utterance of the deceased. He had no doubt that Jeshanah was not misreporting the utterance from the deceased when he was shot. On the way to the hospital the deceased mentioned again, three times, that Polo shot him. Further, it could not be that the deceased made an error when he blurted "Shana Polo!" He had a working relationship with the Appellant. Also, the *res gestae* evidence from the deceased was not the sole evidence against the Appellant and it was strong because of the circumstances under which it was made and the independent support of it by Jeshanah who also recognised the Appellant as the shooter.

[47] In our view, the trial judge properly directed himself as to the approach to the evidence following the guidelines in ***Andrews*** and the cases of ***Trevor Gill v R, Court of Appeal (Belize) No. 15/2006*** and ***Michael Faux v R, Court of Belize, No. 3 of 2007***. The evidence from Jeshanah whom he found to be a credible witness, entitled him to reach those conclusions about the Appellant's guilt. We see no reason to interfere with his conclusions and the weight given to the evidence of the utterances of the deceased and the statements of Jeshanah to Mama and Sgt. Zetina. The Court therefore formed the view that the Appellant received a fair trial despite the absence of cross-examination of the deceased.

[48] In relation to Mr. Banner's argument that the trial judge should have directed himself of the need for caution especially in relation to the *Turnbull* guidelines and the possibility that the deceased was mistaken when he said that Polo shot him, we were of the view that those guidelines were adequately addressed as shown under ground one above. There was no need for the trial judge to give a separate direction in relation to the deceased. Fairness did not require for the judge to repeat himself in relation to the same direction. The main witness, Jeshanah testified as to the lighting, distance, recognition of the Appellant among other things. In this case the trial judge was sitting alone and had the supporting evidence. Also, the trial judge

found that there was no possibility of error and the deceased had sufficient light to observe the person he claimed shot him. The ground could not succeed.

Ground 3: The Crown did not negative the Appellant's defence of alibi

[49] The Appellant's defence was that he was at home when the shooting of the deceased occurred thus raising a defence of alibi. The Appellant by relying upon a defence of alibi, did not merely deny that he shot the deceased, but positively asserts that he was at home when the deceased was shot.

[50] Learned counsel, Mr. Banner submitted that the Crown failed to negative the Appellant's defence of alibi. That the Appellant's unsworn statement showed that he was at home with his wife, Ms. Cante, and his baby at the time of the shooting. Further, Ms. Cante's evidence corroborated the Appellant's version of events and her evidence was not challenged by the Crown. He argued that the Crown failed to negative the Appellant's alibi defence in his notes of interview and no evidence was led as to the failure of the Police Officer to carry out a proper investigation.

[51] The learned Director in response rejected that argument as being erroneous in law. Rather, the Prosecution discharged its duty by calling evidence which proved where the Appellant was at the time the crime was committed, that is, at the scene committing the offence. This was proven by Jeshanah's evidence and therefore the claim that the Appellant was at home was rebutted.

[52] The trial judge rejected Ms Cante's evidence and ruled that it did not help or corroborate the Appellant's defence to establish the alibi of the Appellant that he was at home on 4 October 2017 at 10.30 pm or thereabout. He did not find Ms. Cante to be a credible witness. In relation to the Appellant himself, the trial judge found that most of what was stated in the unsworn statement contradicted the interview statement which occurred on 5 October 2017. Further, the unsworn statement was not corroborated in any material particular by Ms. Cante's evidence. He gave the unsworn statement little to no weight. The trial judge analysed the evidence of the Prosecution and the Defence and was satisfied from the evidence of the Prosecution that it had proven all the elements of the charge of murder. Therefore, the defence of alibi raised by the Appellant was not accepted and failed. The Court agreed with the learned Director that the trial

judge accepted Jeshanah's evidence which clearly rebutted the Appellant's defence of alibi. The alibi was therefore disproved by the Prosecution. This ground therefore failed.

Ground 4: The trial judge did not warn himself on false alibi/Lucas direction and wrongly placed the burden of proving his alibi on the Appellant.

[53] It was submitted by Mr. Banner that the trial judge did not give himself the requisite *Lucas direction/Lie direction.* That this warning was needed since the judge rejected the defence of alibi raised by the Appellant. Counsel relied on ***R v Burge and Peg [1996] 1 Cr. App. R. 163 CA***, which states when a Lucas Direction or Lie Direction must be given.

[54] He further submitted that the trial judge wrongly placed the onus on the Appellant to prove his alibi because he said the following in relation to Ms. Cante's evidence:

> "I therefore reject her evidence and rule it does not corroborate the defence to establish the alibi of the accused that he was home on 4th October, 2017 at 10:30 pm or thereabout."

That statement, counsel submitted wrongly placed the burden on the Appellant to prove his defence. That the trial judge failed to direct himself that the onus was on the Prosecution to negative the defence of alibi and that the required standard is beyond a reasonable doubt.

[55] The learned Director in response submitted that the trial judge did not find the Appellant guilty because he rejected the Appellant's alibi. He considered the Appellants statement under caution and the evidence of the defence witness, Ms. Cante. He compared the two accounts and found them inconsistent to such a degree he rejected the alibi. Further, the statement complained about did not shift the evidential burden or legal burden.

[56] We agreed with the Director that the burden was not shifted on the Appellant. The trial judge after considering the unsworn statement of the Appellant and the evidence of his witness, Ms. Cante, rejected the alibi of the Appellant. He was quite aware that the Prosecution's evidential and legal burden of proving that the Appellant committed the offence with the requisite *mens rea* remained unaffected.

[57] The rejection of the alibi by the trial judge was not evidence of guilt of the Appellant. The Prosecution cannot prove the guilt of an accused merely by disproving his alibi. In ***Halsbury's Laws of England, Criminal Procedure Volume 28 (2021) para 459*** states:

> **"Evidential burden on defendant**
>
> Where the defendant relies upon **evidence of an alibi**, he does not merely deny that he committed the alleged offence, but positively asserts that he was somewhere else when that offence was committed. The prosecution cannot be required to disprove such an alibi unless the defendant has adduced some evidence in support of it, and it follows that the defendant bears an evidential (but not a persuasive) burden in respect of that evidence, **but the prosecution cannot prove the defendant's guilt merely by disproving his alibi. The prosecution's evidential and legal burdens of proving that the defendant committed the offence with the requisite mens rea remain unaffected."** (emphasis added)

[58] The trial judge analysed the evidence of the Prosecution and the Defence and was satisfied from the evidence of the Prosecution that it had proven all the elements of the charge of murder. Therefore, the defence of alibi raised by the Appellant was not accepted and failed. This is clearly set out at the conclusion of the judgment of the trial judge:

> "Therefore, after careful consideration of the above evidence of the Crown and the Defence, I am satisfied from the evidence of the Prosecution that it has proven all the elements of the charge of murder to the court. The defence of alibi as raised by the Defence is therefore not accepted and fails. Accordingly, after careful consideration of all the evidence before me I am satisfied to the extent that I feel sure that the accused inflicted the harm that resulted in the death of the deceased with the intention to kill the deceased. Consequently I find the accused Apolonio Kiow (aka Apolonio Cervera) guilty of the charge of murder."

[59] Accordingly, the Court disagreed with the Appellant that the trial judge placed the onus on the Appellant to prove his alibi because he rejected Ms. Cante's evidence.

[60] If the instant appeal was a judge and jury trial the following directions would have had to be made clear to the jury that there is no burden on the accused to prove that he was elsewhere. The Prosecution must prove its case and that includes the need to prove that the accused committed the offence. The reason for this is set out in ***Broadhurst [1964] AC 441 (MT PC) at 457***:

> "It is very important that a jury should be carefully directed upon the effect of a conclusion, if they reach it, that the accused is lying. There is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty, and accordingly to convict him without more ado. It is the duty of the judge to make it clear to them that this is not so. Save in one respect, a case in which an accused gives untruthful evidence is no different from one in which he gives no evidence at all. In either case the burden remains on the prosecution to prove the guilt of the accused. But if upon the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt. What strength it adds depends, of course, on all the circumstances and especially on whether there are reasons other than guilt that might account for untruthfulness."

[61] As can be seen by that authority, the warning should be given whenever there is a risk that the jury will, having rejected the alibi evidence, assume guilt of the offence charged. In the instant appeal, the judge was sitting alone. As submitted by the Director, the duty of the trial judge in giving his judgment, was to ensure that the basis of his verdict was clearly set out. He was not required to detail every issue which occupied his mind as he came to his decision as shown in the case of ***Dionicio Salazar v The Queen [2019] CCJ 15 (AJ),*** where the CCJ said at [28] and [29]:

> *"[*28] The Court of Appeal in Northern Ireland stated in **R v Thompson** with respect to the duty of the judge giving judgment in a bench trial:
> He has no jury to charge and therefore will not err if he does not state every relevant legal proposition and review every fact and argument on either side. His duty is not as in a jury trial to instruct laymen as to every relevant legal aspect of the law or to give (perhaps at the end of a long trial) a full and balanced picture of the facts for decision by others. His

task is to reach conclusions and give reasons to support his view and, preferably, to notice any difficult or unusual points of law in order that if there is an appeal it can be seen how his view of the law informs his approach to the law.

[29] Equally, a judge sitting alone and without a jury is under no duty to 'instruct', 'direct' or 'remind' him or herself concerning every legal principle or the handling of evidence. This is in fact language that belongs to a jury trial (with lay jurors) and not to a bench trial before a professional judge where the procedural dynamics are quite different (although certainly not similar to those of an inquisitorial or continental bench trial). As long as it is clear that in such a trial the essential issues of the case have been correctly addressed in a guilty verdict, leaving no room for serious doubts to emerge, the judgment will stand."

[62] The basis of the rejection of the alibi was clear and also the basis of the verdict of the trial judge was very clear. The trial judge did not rely on lies to find the Appellant guilty. Therefore, he would not have had to give himself a *Lucas direction.* As shown in the case of ***Rosalia Castillo v The Queen, Criminal Appeal No. 1 of 2015***, a judgment of this Court, it was stated that since the trial judge did not rely on lies of the Appellant, the court was not required to give itself a Lucas direction. See: ***R v Burge and Peg*** where it is shown that such direction is needed where the Prosecution rely on a lie as evidence of guilt in relation to the charge which is sought to be proved. In the instant case, the trial judge relied on the evidence of the Prosecution which proved beyond a reasonable doubt that the Appellant shot the deceased. As such, given the circumstances of this case, there was no miscarriage of justice and we had no reason to interfere with the verdict of the trial judge. The ground failed.

Ground 5: "The summing-up was not balanced, as the trial judge did not sufficiently address his mind to Appellant's case and his assessment of the evidence was more favorable to the Crown."

Purpose of summing-up

[63] This was a trial by judge alone and the trial judge in his written judgment was obliged to show reasons for his decision. The trial judge's "*duty is not as in a jury trial to instruct laymen as to every relevant legal aspect of the law or to give ..... a full and balanced picture of the facts for decision by others. His task is to reach conclusions and give reasons to support his view."* Further, a judge sitting alone is under no duty to "instruct", "direct" or "remind" him or herself concerning every legal principle or the handling of evidence. See ***Salazar*** at [28] and [29].

[64] In a jury trial, the jury's verdict is not reasoned. The purpose and nature of the summing-up as shown in the case of ***Regina v Reynolds (Nicholas) [2020] 4 WLR 16 at para 50***, serves two purposes: (i) It reminded the jury of the salient facts and the prosecution and defence case in relation to those facts; and (ii) since a jury's verdict is not reasoned, it provided an assurance that the verdict was founded on the facts described in the summing up.

[65] Whether it is a jury trial or a judge alone trial, a trial judge need not rehearse all the evidence and arguments in a case. As shown in ***Reynolds*** at [53] – [54]:

> 53. ….. the summing-up need not rehearse all the evidence and arguments. As Lord Morris of Borth-y-Gest said in **McGreevy v Director of Public Prosecutions [1973] 1 WLR 276:**
>
> > 'The particular form and style of a summing-up, provided it contains what must on any view be certain essential elements, must depend not only upon the particular features of a particular case, but also on the view formed by a Judge as to the form and style that will be fair and reasonable and helpful'.

54. What is helpful will depend on the case. A recitation of all the evidence and all the points made on each side is unlikely to be helpful; and brevity and a close focus on the issues is to be regarded as a virtue and not a vice, see Rose LJ in **R v Farr [1999] Crim LR 506** cited in **R v Amado-Taylor** at p 192a. Since a summing-up of the evidence is by its nature a summary, it is bound to be selective; and providing the salient points are covered and a proper balance is kept between the case for the prosecution and the defence, this court will not be lightly drawn into criticisms on points of detail."

Function of Court of Appeal

[66] This Court is a court of review and not a court of trial. In *Gregory August v R [2018] CCJ 7* (a jury trial) **at [**39] and [40] the CCJ noted:

"[39] The strong circumstantial evidence provided a rational basis for the finding of the jury and we are satisfied that there was sufficient evidence to support the verdict. To uphold August's appeal would amount to usurping the function of the jury as the sole finders of fact. The cases are legion that decry the usurpation of the jury's verdict by appellate courts. We echo the sentiments of the House of Lords that an appellate court is:

> 'a court of review, not a court of trial. It may not usurp the role of the jury as the body charged by law to resolve issues of fact and determine guilt... Trial by jury does not mean trial by jury in the first instance and trial by judges of the Court of Appeal in the second ... the Court of Appeal is not privy to the jury's deliberations and must not intrude into territory which properly belongs to the jury'.

[40] Similarly, the Court of Appeal of England and Wales has held that, 'it is not the function of this court to decide whether or not the jury was right in reaching its verdicts"; neither is it an appellate court's function to "review the decisions of juries in order to substitute its own view'. Although not the case here, the prohibition against intruding into the domain of the jury holds true

> 'even in a case of difficulty and complexity' as the 'primacy of the jury in our criminal justice system has to be respected'.

[67] The principles in ***August*** is also applicable in a judge alone trial. If it is shown in the judgment of the trial judge, the finder of fact, that he had a rational basis for coming to his conclusions, the Court should not interfere.

The failures and criticism complained about by the Appellant

Trial judge failed to address his mind that Ms. Cante's evidence was not challenged

[68] Mr. Banner contended that the trial judge fell into error in looking at minor inconsistencies as to the different accounts as to what the appellant did throughout the day and not where he was at 10:30 p.m. when the shooting occurred. Further, the trial judge did not address his mind that (a) Ms. Cante's evidence was not challenged by the Prosecution that the Appellant was home when the shooting occurred and (b) the Appellant's notes of interview said he was at home with his wife and Ms. Vernon. Counsel therefore, challenged the trial judge's analysis of the evidence and his finding that Ms. Cante was not a credible witness and therefore her evidence did not corroborate the unsworn statement of the Appellant. He criticised the trial judge for being over critical of discrepancies in relation to where the Appellant was throughout the day and not where he was when the deceased was shot at 10:30 pm.

[69] The Court's examination of the Record at pages 105 – 107 showed that the cross-examination of Ms. Cante by the Prosecutor was geared towards establishing that she and the Appellant were proffering a false alibi. Ms. Cante's evidence was that the Appellant went home at 7.00 pm and never went out back until the Police arrived at midnight to get him. The Prosecutor did not specifically asked the witness if the Appellant was home at 10.30 pm when the shooting took place, but it is obvious from the cross-examination that Ms. Cante's credibility was in question. At page 107 of the record the questions and answers were:

> "Q. Before 7.00 pm your husband Mr. Kiow never came at 5.30 pm back to your house to pick up an extension cord?
> A. Yes. He came to pick it up.

Q. You sure it was 5.30 pm?

A. Yes.

Q. You just told the court your husband never came home before 7.00 pm. Now you say yes, he came home at 5.30 pm which is it?

A. I didn't understand what you are saying.

Q. I am suggesting you are lying to the Judge?

A. I am telling the truth."

[70] Even if the Prosecutor was not direct in cross-examination in relation to the time of shooting, the trial judge having heard the totality of the evidence found Ms. Cante to be untruthful and it is obvious that the trial judge addressed his mind to where the Appellant was at the time of the shooting as he found Jeshanah was credible and her evidence proved where the Appellant was at 10.30 pm. Accordingly, the Court saw no basis to interfere with the ruling of the trial judge that Cante's evidence "*does not help or corroborate the defence to establish the alibi of the accused that he was at home on the 4th of October ,2017 10:30 pm or thereabout."* The trial judge therefore, cannot be faulted when he ruled that the unsworn statement of the Appellant was not corroborated in any material respect by Ms. Cante.

[71] In the view of the Court, the trial judge fairly set out the case for the defence and cannot be faulted for considering the totality of the evidence pertinent to the defence of alibi which he rejected after a careful and detailed analysis. As the judge of the facts, it was within his purview to reject the version of events put forward by the Defence and accept the case for the Prosecution that the Appellant was the person who shot the deceased and therefore he could not have been at home at 10.30 pm.

[72] Mr. Banner argued that when the trial judge rejected Ms. Cante's evidence he did not exercise his discretion judiciously as her evidence supported what the Appellant said in his dock statement and his notes of interview that he was at home at the time of the incident. This argument is unacceptable as the trial judge is not bound to accept the case for the Defence because two witnesses gave the same version. The Court agreed with the Director that this kind of analysis would have led the trial judge into error.

The point made about witnesses not called to give evidence

[73] Mr. Banner submitted that the judge was critical in his judgment because the Appellant did not call Ms. Vernon, his neighbour to testify that he was at home, since he stated in his notes of interview that Ms. Vernon was at home with his wife. Counsel submitted the judge did not take the same approach with the Crown's case. He suggested that in relation to the *res gestae* principle there would have been a balance if the judge had stated that the Crown should have called Vianne Olivia who drove the pickup to take Jeshanah and the deceased to the hospital.

[74] In the view of the Court, the trial judge found Jeshanah to be a credible witness and as such he was not bound to mention in his judgment that the evidence from Olivia would have further supported the case for the Prosecution. On the other hand, he did not find Ms. Cante to be credible. We noted that in relation to the alibi defence, the trial judge gave himself a direction to the effect that the fact that an alibi is false does not mean that a defendant is guilty as we discussed above. Further, it should be noted that though the trial judge relied on the *res gestae* evidence together with the identification evidence, Jeshanah's evidence alone was sufficient to convict the Appellant as previously discussed.

Trial judge failed to identify weakness in the identification evidence and did not accept evidence of lighting from scenes of crime technician

[75] Mr. Banner complained that the trial judge did not accept the scenes of crime technician evidence that the place was dark even though she was the witness who was best suited to give independent evidence to the lighting condition. In our view, it is the trial judge who heard the witnesses testify to decide whose evidence to accept or reject. He recounted the evidence of the witnesses Sgt #1309 Zamir Noh, PC #1285 Anthony Williams, W/Cpl #1377 Belky Gilharry, all of whom he stated corroborated the evidence of Jeshanah that the lighting conditions in the area was "bright/clear." He said that "*it is noted that it was in that light she stated she saw and recognized the shooter on 4th October, 2017 at her residence in Corozal Town."* The judge found that according to Jesanah "the lighting conditions was bright and good, this was corroborated by the police witnesses who went to her home shortly after the incident." For those reasons, he was

satisfied from her description of the shooter, that the description as the Crown submitted, does fit the accused perfectly. The trial judge clearly set out how he arrived as his finding.

[76] Counsel submitted that the trial judge misquoted or misunderstood the length of time Jeshanah had the shooter's face under observation. We have discussed this ground already and was of the view that the trial judge properly assessed the identification evidence. Also, he gave himself the warning of the need for caution as shown in the ***Turnbull*** guidelines.

Criticisms on how trial judge treated Jeshanah's description of the Appellant

[77] Counsel was also critical of how the trial judge treated Jeshanah's evidence as to the description of the Appellant which he contended was used by the trial judge to support the identification evidence. Counsel submitted that if the Appellant was known to Jeshanah all her life then the description she gave could have come from her memory and not necessarily from her observation on the night of the shooting. In the view of the Court, the description of the shooter goes to the core of identification. Jeshanah was able to identify the Appellant because of her observation of him that night. How else would she have known it was him? The trial judge had to be satisfied that it was the Appellant she saw shot the deceased. She clearly stated in her evidence, "***The person I saw*** *a chubby short guy with acne on his face, dark brown skin, has grey and black short hair. He had a cloth covering his mouth. Long pants and shirt with sleeves."* This criticism was not justified.

Conclusion

[78] In the view of the Court, the complaints by the Appellant of failures of the trial judge were unwarranted. Also, there were no proper basis for the criticisms on how the trial judge analysed the evidence. The Court was satisfied that the trial judge maintained a fair balance between the case for the Prosecution and the case for the Defence. The fact that the assessment of the evidence was more favourable to the Crown had no relation to balance. The defence of the Appellant was alibi and the trial judge thoroughly analysed the unsworn statement and the evidence of the Appellant's witness Ms. Cante. He was the finder of facts and found the witness for the Prosecution credible and rejected the alibi defence. The ground that the summing-up was not balance therefore failed.

Ground 6: The absence of a good character direction affected the fairness of the trial

Good character not raised during the trial

[79] The complaint under this ground by the Appellant was that the absence of a good character direction affected the fairness of the trial. Further, he submitted in light of ***Gregory August***, the absence of a good character direction in respect of the propensity limb deprived the Appellant of a fair trial.

[80] It is to be noted that the Appellant's good character was not raised during the trial and therefore, the trial judge cannot be faulted that such direction was not given. If the trial judge was so aware, he would have had a duty to ensure that the trial is fair and give the appropriate good character direction. The duty of this Court is to now address whether the absence the relevant good character direction would have affected the outcome of the guilt of the Appellant.

The two limbs of good character direction

[81] The good character direction contains two limbs, the credibility direction and the propensity direction. The credibility direction is that a person of good character is more likely to be truthful than one of bad character. The propensity direction is that a person of good character is less likely to commit a crime especially one of the nature that which they are charged than a person of bad character. See ***Hall [2020] CCJ 1 (AJ) at [42]***.

The test where good character direction not given in the trial

[82] An accused who has a good character and gives evidence is entitled to the credibility limb and propensity is given whether or not an accused has given evidence. In the instant matter, the Appellant would have been entitled to a propensity limb direction as he gave an unsworn statement from the dock. The trial judge was unaware of the Appellant's good character. This however, does not automatically mean that the trial was unfair. The Court agreed with Madam Director that it is not the case, as argued for the Appellant, that in the absence of the propensity direction, he had been deprived of a fair trial.

[83] In ***August*** at [42] – [53], the CCJ considered the issue of whether the absence of a good character direction affected the safety of the conviction and the fairness of the trial. The Court stated:

> "[48] The question which remains for us is whether a defendant who has given an unsworn statement from the dock should be entitled to the credibility limb of the good character direction. The jurisprudence coming out of Jamaica suggests that where a defendant either did not give sworn evidence or gave unsworn evidence of his character, a good character direction as to credibility would have a "reduced value", would be "altogether less helpful" or would be "qualified".
>
> [49] It is understood that the aim of a good character direction is to ensure fairness of the trial process. It is the duty of the trial judge to ensure that the trial is fair and even-handed and an appropriate good character direction plays an important part in ensuring that fairness and even-handedness. Where a defendant, of good character, has given sworn testimony and has subjected himself to cross-examination, the trial judge maintains fairness and balance in the trial by directing the jury that, because of his good character, the defendant is a person who should be believed. Where however the defendant is not willing to place himself in a position where his credibility can be tested, we do not think that he should benefit from a good character direction as to credibility. Where a defendant does not give sworn testimony therefore, it is in our view, unnecessary to ensure the fairness of the trial process, for the trial judge to direct the jury on the defendant's credibility. The defendant is, however, still entitled to the propensity limb whether or not he has given sworn evidence.
>
> [50] Bearing those principles in mind, we move on to examine whether the failure to give a good character direction as to propensity affected the safety of August's conviction or the fairness of the trial. In this regard, we agree with the useful guidance given in the Privy Council appeal of **Bally Sheng Balson v The State**…
>
> [52] … **We have considered what the proper test should be**. We are of the view that

we must be satisfied, not that the case against August was overwhelmingly strong, but that, had the jury been given a good character direction on propensity, they would have reached the same conclusion. In other words, **the proper test should be that the case against August must have been sufficiently strong that this Court could safely say that the jury would have inevitably convicted him.**

[53] August, having given unsworn evidence, was therefore not entitled to a good character direction on credibility but should have been given the benefit of the propensity limb of the direction. As for the impact of the absence of the propensity limb of the good character direction, we have examined the circumstantial evidence adduced by the prosecution and have formed the view that such evidence led inexorably to August's guilt. We are convinced that the case against August was sufficiently strong, and that it was inevitable, even if a good character direction on propensity had been given, that the jury would have returned the same verdict. This view is buttressed by the fact that the jury returned their guilty verdict notwithstanding several serious misdirections by the trial judge that were all unduly favourable to August. In our view, the circumstantial evidence was sufficient to outweigh any assistance that would have been afforded by a good character direction on August's propensity to violent conduct. Accordingly, the conviction was safe and the trial fair. August therefore fails on this ground." (emphasis added)

[84] In the instant appeal, as stated above, the Appellant was not entitled to a good character direction on credibility because he had not given sworn evidence. However, he was entitled to a propensity limb of the good character direction. This Court was of the view that the trial judge was entitled to find that it was the Appellant who shot the deceased and caused his death. We applied the test in ***August*** and were satisfied that the case against the Appellant was sufficiently strong and had the trial judge given himself a good character direction on propensity, he would have reached the same conclusion as to his guilt. The evidence of Jeshanah was conclusive of the guilt of the Appellant and therefore, the conviction was safe and the trial fair. The ground of appeal failed.

Conclusion

[85] For all those reasons, the Court dismissed the appeal of the Appellant and affirmed his conviction.

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HAFIZ-BERTRAM, P

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MINOTT-PHILLIPS, JA

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ARANA, JA